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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GTE DIRECTORIES CORPORATION, *et al.*
Petitioners,

vs.

YELLOW PAGES COST CONSULTANTS, *et al.*
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an agent for purchasers has standing under § 4(a) of the Clayton Act to maintain an action for treble damages against a seller who makes a unilateral decision to contract only with its customers.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following entities were parties to this case in the court below: GTE Directories Sales Corporation, GTE Directories Publishing Corporation, GTE Directories Printing Corporation, GTE National Marketing Services Corporation; GTE Directories Distribution Corporation (formerly GTE MarketWorld, Inc.); Media Masters, Inc.; Tel-Ad Advisors, Inc.; and Southern Directory Consultants, Inc.

Pursuant to Rule 29.1 of the Rules of this Court, the following is a statement of all parent companies and non-wholly-owned subsidiaries of Petitioners:

GTE Directories Sales Corporation, GTE Directories Publishing Corporation, GTE Directories Printing Corporation, GTE National Marketing Services Corporation and GTE Directories Distribution Corporation (formerly GTE MarketWorld, Inc.) are wholly-owned subsidiaries of GTE Directories Corporation, which in turn is a wholly-owned subsidiary of GTE Corporation.

GTE Directories Corporation has an ownership interest in GTE Directories Corporation Ltd. GTE Directories Corporation also owns 100% of GTE Directories (Asia) Limited which has a 30% ownership interest in GTE Directories (Philippines) Corporation, a joint venture. GTE Directories Corporation has an ownership interest in the following joint ventures: GTE Directories (B) Sdn. Bhd; GTE Directories (Lanka) Pte. Ltd.; and General Telephone Directory Company (Thailand) Ltd.

GTE Directories Sales Corporation owns 100% of GTEX Corporation which has a 49% interest in Chesapeake Directories Sales Company, a partnership.

GTE Directories Publishing Corporation, GTE Directories Printing Corporation, GTE National Marketing Services Corporation and GTE Directories Distribution Corporation have no non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which reversed the decision of the United States District Court for the Northern District of California granting summary judgment in favor of petitioners.

OPINIONS AND ORDERS BELOW

The December 24, 1991 opinion of the Court of Appeals for the Ninth Circuit is reported at 951 F.2d 1158 and is reproduced in Appendix ("App.") A, *infra*, la-12a. The May 26, 1989 opinion and order of the district court granting summary judgment are reported at 716 F. Supp. 1306 and are reproduced in App. B, *infra*, 13a-29a.

JURISDICTION

The opinion of the Court of Appeals was filed on December 24, 1991. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved in this case, §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 4(a) of the Clayton Act, 15 U.S.C. § 15(a), are reproduced in relevant part in App. C, *infra*, 30a.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners GTE Directories Corporation and its subsidiary corporations[1] (collectively "GTE/DC") are in the business of selling, printing, publishing and distributing yellow pages advertising in GTE and independent yellow pages telephone directories throughout the country. *See* Second Amended Complaint at ¶ 11. This business entails the sale of yellow pages advertisements, the publishing of voluminous directories on an ongoing basis, and the distribution of these directories throughout the areas serviced by GTE/DC. *Id.*

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[1] The other petitioners in this case are GTE Directory Sales Corporation, GTE National Marketing Services Corporation, GTE Directories Publishing Corporation, GTE Directories Printing Corporation, and GTE Directories Distribution Corporation, formerly GTE Marketworld, Inc., each of which is a wholly owned subsidiary of GTE Directories Corporation.

Respondents Yellow Pages Cost Consultants, Inc., *et al.*[2] (collectively "YPCC") offer a service to yellow pages customers consisting of advice on form, content, design and placement of yellow pages advertisements. Second Amended Complaint at ¶ 10. YPCC's principal function is to advise advertisers how to reduce their expenditures for yellow pages advertising. *Id.* at ¶¶ 10, 20. YPCC is paid a percentage of its clients' savings in yellow pages advertising costs. App. A, *infra*, 2a.

YPCC will also act, in its own words, as its clients' "agent in the purchase of such advertisements." *See id.* at ¶¶ 10, 19. Prior to a change in GTE/DC policy that served as the catalyst for this lawsuit, YPCC acted in this capacity for numerous advertisers, directly placing advertisements in GTE/DC directories by entering into contracts with GTE/DC on behalf of the GTE/DC customers. App. A, *infra*, 3a.

In April of 1985, GTE/DC announced that it would thereafter enter into contracts for local yellow pages advertising with its advertisers directly and not with intermediaries such as YPCC. App. B, *infra*, 15a. Whether to use a consultant, however, was left up to the advertisers. There is no contention in this case that GTE/DC refused to deal with advertisers who utilized the services of YPCC. "GTE/DC did not . . . do anything else to restrict advertisers' use of plaintiffs' services." App. B, *infra*, 15a. And it is not contended that GTE/DC ever refused to sell its product, yellow pages advertising, to YPCC. Thus, the

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[2] Respondents in this case are Yellow Pages Cost Consultants, Inc., Media Masters, Inc., Tel-Ad Advisors, Inc., and Southern Directory Consultants, Inc.

sole conduct that gives rise to YPCC's antitrust allegations in this case is GTE/DC's insistence that its customers contract directly with GTE/DC for the product they were purchasing.[3]

YPCC filed suit for damages under Clayton Act § 4, 15 U.S.C. § 15, alleging that GTE/DC's April, 1985 policy change violated, *inter alia*, §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. *See* App. A, *infra*, 3a. The Sherman Act § 2 claim asserts that GTE/DC used its alleged monopoly power in the yellow pages advertising market to obtain a monopoly in what YPCC characterized as a separate "consulting market" by insisting on entering into contracts with yellow pages advertising purchasers rather than with YPCC in its capacity as agent for the advertisers. *See id.* The second claim, asserted under Sherman Act § 1, alleges that GTE/DC's contracts with local telephone companies, combined with its refusal to enter into contracts with YPCC, constituted an unlawful restraint of trade. *See id.* The third claim, also brought under § 1 of the Sherman Act, alleges that GTE illegally tied the sale of yellow pages advertising to the utilization of what YPCC characterized as GTE/DC's "free" consulting service. *See id.*

B. The Proceedings Below

GTE/DC moved for summary judgment, arguing, *inter alia*, that YPCC suffered no antitrust injury and lacked antitrust standing. The thrust of GTE/DC's argument was that cost consultants are not partici-

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[3]Although the Complaint alleges that GTE/DC engaged in other acts of "harassment" aimed at YPCC, only the April 1985 policy change is alleged to give rise to the antitrust claims in this case. App. A, *infra*, 3a; App. B, *infra*, 15a.

pants in the same market as GTE/DC—they are neither customers nor competitors of GTE/DC—and accordingly (1) their alleged injury is not of the type that the antitrust laws were intended to prevent, and (2) as mere agents for advertisers, they lacked standing to assert the antitrust claims against GTE/DC.

YPCC urged in response that cost consultants are competitors of GTE/DC and thus possess standing under the antitrust laws to challenge GTE/DC's policy change. This argument was predicated on the contention that a portion of the normal activity of GTE/DC sales personnel—that portion involved in describing and tailoring the product to fit the needs of the customer—was a separate service—"consultation"—that was the same as the discrete product offered by YPCC to its customers. In essence, YPCC argued that GTE/DC had vertically integrated a separate consulting service into the sale of its product.

The district court found that YPCC's argument "defies both economic and common sense." App. B, *infra*, 17a. While accepting as true all of YPCC's factual allegations for purposes of the summary judgment motion, the court nonetheless concluded that these facts simply could not sustain the economically and legally untenable conclusion that GTE/DC, as a seller of yellow pages advertising, competes in any antitrust sense with persons whose "product" is counseling GTE/DC customers on strategies for purchasing less advertising from GTE/DC. App. B, *infra*, 23a. In fact, the district court found "that it would be impossible for GTE/DC to provide the same service that [YPCC] provide[s]." *Id.* at 18a. Therefore, YPCC had neither suffered the requisite antitrust injury nor possessed the requisite antitrust standing to pursue

any claims against GTE/DC under Clayton Act § 4. *Id.* at 23a.

The Ninth Circuit reversed the judgment of the district court, holding that "the district court erred in concluding that [YPCC and GTE/DC] do not compete." App. A, *infra*, 5a. The Ninth Circuit principally relied for this holding upon statements contained in certain GTE/DC documents that referred to cost consultants as "competitors". *Id.* at 5a-7a. It also relied upon certain GTE/DC promotional materials that discouraged advertisers from utilizing the services of cost consultants on the ground that GTE/DC would provide the same service to the advertiser, *i.e.*, advice concerning how most efficiently to purchase yellow pages advertising. *Id.* On the basis of this evidence, the Ninth Circuit concluded that YPCC has antitrust standing to challenge GTE/DC's policy change. *Id.* at 12a.

SUMMARY OF ARGUMENT

Antitrust standing is a threshold legal determination. A court must make two fundamental preliminary determinations to ascertain whether antitrust standing exists, *i.e.*, whether the plaintiff is the proper party to vindicate the goals and purposes of the antitrust laws. One such determination is whether the plaintiff has alleged *antitrust* injury, that is, injury of the sort that the antitrust laws were intended to prevent. Absent such a showing, the plaintiff's case must fail as a matter of law. Of equal importance, the court must determine that the plaintiff is a participant in the same economic market as the defendant. Typically, following this Court's guidance in *Associated General Contractors of California v. Cal-*

ifornia State Council of Carpenters, 459 U.S. 519, 535 (1983), ("*Contractors*") the focus of this inquiry is on whether the plaintiff is a customer or a competitor of the defendant. If the plaintiff is neither, this Court has not accorded standing to seek antitrust damages for unilateral marketplace actions.

The district court below correctly determined that YPCC lacked the requisite antitrust standing to challenge the unilateral decision of GTE/DC to insist on dealing directly with its advertising customers rather than through an intermediary. The Ninth Circuit's conclusion to the contrary is not only wrong and at odds with the purposes underlying the antitrust laws, but has created an unsettling conflict with other Courts of Appeals on both of the critical subsidiary standing inquiries described above, *i.e.*, whether middlemen in this situation suffer antitrust injury, and whether they participate in the same economic market as the seller.

On the question of antitrust injury, the Ninth Circuit's holding conflicts directly with decisions of the Fifth and Sixth Circuits which have held as a matter of law that middlemen who provide services that are functionally indistinct from those provided by YPCC in this case do not suffer antitrust injury as a consequence of a seller's decision to deal directly with its buyers. On the other critical antitrust standing inquiry—whether plaintiff and defendant are participants in the same economic market—the Ninth Circuit's holding that YPCC competes with GTE/DC in a "consulting" market artificially carves out an inseparable segment of the normal conversation that occurs during a sales transaction as if that discussion were a separate product. That approach is analytically

untenable and conflicts with this Court's own approach to defining economic markets in antitrust cases. Moreover, the Ninth Circuit's decision conflicts with decisions of the Courts of Appeals for the Fifth, Eighth and Eleventh Circuits, each of which has held that middlemen do not compete in any antitrust sense with sellers.

The Ninth Circuit's legal analysis also undermines fundamental policies underlying the antitrust laws. Those laws were intended to promote, rather than discourage, entrepreneurial investment, and technological and economic innovation, and not to protect free riders. However, the Ninth Circuit's holding would punish the entrepreneur and reward the opportunist by requiring the former to do business with the latter, even though the opportunist is not himself interested in purchasing the entrepreneur's product and serves no purpose other than to draw profits away from the entrepreneur's enterprise by discouraging purchases of that product. This expansive deviation from recognized concepts of antitrust standing would open the floodgates to counterproductive antitrust litigation.

REASONS FOR GRANTING THE WRIT

This case raises the novel yet important question whether a middleman in a sales transaction may avail itself of the provisions of the Clayton Act to challenge unilateral efforts of a seller to deal directly with its own customers. While this Court has dealt on several occasions with restrictions imposed by sellers on distributors and on sales agents, and has clearly recognized the importance of these issues to the proper functioning of the antitrust laws, the Court has never

addressed the alleged illegal conduct of a seller directed towards an independent, free riding middleman.

Although the issue is one of first impression for this Court, it is an issue that has grown and will continue to grow in importance as distribution patterns throughout the nation's economy evolve and become more sophisticated and complex.[4] The Ninth Circuit's decision represents a dangerous new approach to this Court's jurisprudence concerning antitrust standing and injury. It allows antitrust plaintiffs to avoid summary judgment on these critical threshold legal issues by recourse to market theories that lack any semblance of economic grounding.

The importance of the Ninth Circuit's error in this case transcends the conflict it presents with decisions of other Courts of Appeals; the Ninth Circuit decision expands the universe of potential antitrust plaintiffs well beyond that contemplated by the federal antitrust laws:

> Antitrust enforcement becomes divorced from antitrust policy when treble damages bear no relation to the anticompetitive effects of the illegal conduct. Such awards threaten to make every business tort convertible into a treble-damage bonanza. The antitrust laws were not intended as a balm for all wrongdoing in the business com-

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[4] The use by purchasers of consultants to assist in the acquisition of products and services can run the gamut from reliance by consumers on publications such as *Consumer Reports*, to the retention by corporations or government entities of major consulting firms to provide comprehensive advice on the proper choice of major data processing networks to purchase.

> munity. They were designed to promote free competition. That clear focus is lost when courts allow treble damages to plaintiffs who show no injury related to the breakdown of competitive conditions in the marketplace.

Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 751 (9th Cir. 1984) (Kennedy, J., dissenting). By granting standing to "buffers" such as YPCC, the Ninth Circuit announces a standard that rewards free riders, discourages capital investment, economic growth and innovation, and contravenes the fundamental goals of the antitrust laws.

The implications of the Ninth Circuit's decision are dramatic. Legitimate business practices that have gone either unchallenged or, when challenged have been disposed of summarily, can become the subject of full blown antitrust trials attacking conduct that, at worst, may constitute a simple business tort or, as in the present case, does not represent a wrong that has ever been recognized by the courts. Nonmeritorious treble damage litigation—the precise target of this Court's decision in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)—will resume unchecked by any requirement of substantive merit. The lid to this Pandora's Box should be resealed.

A. The Ninth Circuit's Analysis Of Antitrust Standing In This Case Conflicts Squarely With Decisions Of Other Courts Of Appeals.

The class of persons who may maintain a private action for damages under the antitrust laws is defined in § 4 of the Clayton Act as "any person who shall be injured in his business or property by reason of

anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15(a). But "[i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982). Therefore, the doctrine of antitrust standing has been recognized by this Court as critical to the proper threshold identification of parties who are entitled to maintain a cause of action for alleged federal antitrust violations.[5]

To evaluate whether a plaintiff possesses antitrust standing—an inquiry of law rather than of fact[6]—this Court has instructed courts "to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Contractors*, 459 U.S. 519, 535 (1983). The Court in *Contractors* identified several factors to be considered in determining whether a plaintiff is the proper party to maintain

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[5] As the Sixth Circuit stressed in *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874 (6th Cir. 1991), *petition for cert. filed*, (U.S. Feb. 5, 1992) (No. 92-1244):

> Antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. . . . Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with economic problems whose solutions these policies were intended to effect.

949 F.2d at 877.

[6] *See, e.g., Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir.), *cert. denied*, 472 U.S. 1018 (1985).

an antitrust cause of action. Central among them is whether the plaintiff has suffered antitrust injury. *See* 459 U.S. at 545. Unlike the other factors delineated in *Contractors* as relevant to antitrust standing, antitrust injury has been expressly held by this Court to be "necessary . . . to establish standing under section 4." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n. 5, 111 n. 6 (1986).[7]

Contractors also emphasized that "the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of *participants in the relevant market*." 459 U.S. at 538 (emphasis added). Applying these principles, the Court in *Contractors* focused its legal inquiry upon whether the plaintiff Union was either a competitor or a customer of the alleged wrongdoer. *Id.* at 538-39. Since it was not, its interests were not clearly

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[7] *Contractors* also delineated several prudential considerations, *e.g.* the derivative nature of the injury, the risk of duplicative recovery, the complexity of apportioning damages, the speculative nature of the damages, and the existence of more directly affected potential plaintiffs, for the lower courts to evaluate in determining whether a particular antitrust plaintiff has standing. 459 U.S. at 537-45. Given YPCC's role as a mere agent for the purchaser of GTE/DC's product, the district court below properly held that each of these factors weighed against any conclusion that YPCC was the proper party to bring this antitrust action. The Ninth Circuit's reversal of this holding was premised upon its erroneous legal conclusion that YPCC competes with, and thereby suffered antitrust injury at the hands of, GTE/DC. Although GTE/DC disputes the Ninth Circuit's conclusions concerning these prudential considerations, the focus of this petition is on the dispositive legal errors of the Ninth Circuit regarding YPCC's antitrust injury and status as a competitor of GTE/DC, from which its other erroneous conclusions flowed.

served, and indeed in that case may actually have been harmed, by enhanced competition in the market. *Id.* Courts that have addressed the antitrust standing issue following *Contractors* have adopted this inquiry as another critical threshold to determining whether antitrust plaintiffs have standing under Clayton Act § 4.

As set forth more fully below, the Ninth Circuit's evaluation of both of these critical antitrust standing inquiries is fundamentally flawed, and is inconsistent with decisions of other Courts of Appeals on these same issues. This conflict between the Circuits is real, and threatens to sow confusion in the antitrust standing inquiry that must regularly be conducted by the lower courts. This Court should grant this petition to clarify this important area of antitrust law.

1. The Ninth Circuit Has Impermissibly Altered The Threshold Necessary To Establish Antitrust Injury, And Has Created A Significant Conflict With The Fifth and Sixth Circuits.

In *Atlantic Richfield Co. v. USA Petroleum, Co.*, 110 S. Ct. 1884 (1990), this Court reaffirmed the importance of antitrust injury as a threshold determination in claims brought under § 4 of the Clayton Act, stressing that a plaintiff seeking damages "must prove the existence of '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " 110 S. Ct. at 1889, (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) (emphasis in original). The injury allegedly suffered by YPCC as a consequence of GTE/DC's decision to contract directly with its own customers is not this type of injury.

In *United States v. General Electric Co.*, 272 U.S. 476, 488 (1926), this Court held that "[t]he owner of an article . . . is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer. . ." The *General Electric* case was one of several cases decided by this Court upholding the right of an owner of property unilaterally to forego sales to consumers through middlemen in favor of a distribution network in which ownership passes directly from seller to buyer.[8]

Consequently, even if YPCC was injured as a result of GTE/DC's unilateral decision to deal directly with its customers, any such injury plainly was *not* the type that the antitrust laws were intended to prevent. Other Courts of Appeals have rejected similar attempts by "non-competitive middlemen" to bring antitrust claims against sellers who have implemented programs designed to promote direct interaction between the seller and his customer. These cases hold as a matter of law that any alleged injury flowing to such middlemen is not antitrust injury, and that, accordingly, the plaintiffs cannot maintain an action under § 4 of the Clayton Act.

Most recently, the Sixth Circuit in *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874 (6th Cir. 1991), *petition for cert. filed*, (U.S. Feb. 5, 1992) (No. 92-1244), rejected an antitrust challenge to a unilateral change in policy by Hewlett-Packard con-

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[8] *See Reeves, Inc. v. Stake*, 447 U.S. 429, 438-39 (1980) (acknowledging " 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal' "); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

cerning service contracts on its minicomputers. The policy change had the effect of undermining the ability of HyPoint—a company in the business of selling service contracts on Hewlett-Packard minicomputers—to profit from disparities in service options offered by Hewlett-Packard.

Despite the presence of a factual dispute concerning whether Hewlett-Packard's policy change was intended simply to harm HyPoint or rather was motivated by legitimate business justifications, the Sixth Circuit reversed a jury verdict in favor of HyPoint, concluding as a matter of law that HyPoint had failed to establish antitrust injury.[9] The *HyPoint* court, like the district court in this case, recognized that parties like HyPoint (and YPCC) who simply place themselves between purchasers and sellers in the marketplace and deflect revenues away from the seller may compete "in a semantic sense, but not as a matter of economics." *Id.* at 877. Consequently, the court held

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[9] As with HyPoint, YPCC contends that GTE/DC's policy change was motivated solely by a desire on the part of GTE/DC to monopolize a market—here an alleged market for consultation services. GTE/DC has offered numerous amply supported legitimate business justifications for its desire to deal directly with its customers, including, among other factors, limiting the scope of GTE/DC's contractual liability by having the contract signed by the customer rather than an intermediary, enabling GTE/DC to deal directly with the financially responsible party to the sales transaction, and enabling GTE/DC to control the quality of advertisements submitted for publication. As the Sixth Circuit concluded in *HyPoint*, however, and as this Court held in *Associated General Contractors*, 459 U.S. at 537, even if YPCC's allegation of anticompetitive intent is accepted as true, such a motive would not support a finding that YPCC has suffered antitrust injury or has antitrust standing to bring this case.

that no injury to *competition* flowed from HyPoint's elimination from the market. *Id.* at 877-78.

The *HyPoint* court also found that even if Hewlett-Packard possessed monopoly power in the market alleged by HyPoint, HyPoint's elimination from the market had no effect upon Hewlett-Packard's alleged monopolization of that market. HyPoint did not provide an alternative service, it simply paid (on behalf of its customers) for the services of the alleged monopolist. Since Hewlett-Packard remained free to reduce output or increase prices regardless of HyPoint's presence in the marketplace, HyPoint had no potential to make Hewlett-Packard more efficient. "Because the demise of HyPoint's service contract business did not diminish competition, HyPoint is unable to demonstrate antitrust injury." *Id.* at 878.

Precisely the same analysis applies in the instant case. YPCC gave advice to GTE/DC customers and inserted itself as the contracting party with GTE/DC in place of GTE/DC's customers. But the customers nevertheless had to pay GTE/DC—*not* YPCC—for advertising. Thus, as with *HyPoint*, YPCC "had no potential to make the alleged monopolist [GTE/DC], more efficient, since .... [GTE/DC] was free to reduce output and increase prices, the standard evils of monopoly power, to the same extent whether or not [YPCC] existed." *Id.*[10] Consequently, for precisely the

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[10] This point underscores a basic flaw in the Ninth Circuit's analysis. Quoting from its earlier decision in *United States v. Syufy Enters.*, 903 F.2d 659, 662-63 (9th Cir. 1990), the court concluded without analysis that YPCC imposes "an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost ...." App. A,

same reasons that the Sixth Circuit found no antitrust injury in *HyPoint,* no antitrust injury can be demonstrated by YPCC; YPCC's injury had no effect whatsoever on competition in the market in which GTE/DC competes.

The Fifth Circuit also has held that middlemen cannot establish antitrust injury as a consequence of efforts by sellers to deal directly with purchasers. In *Almeda Mall, Inc. v. Houston Lighting and Power Co.*, 615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980), the court held that the owners of shopping malls cannot rely upon the federal antitrust laws to force an electric company to provide power to a single hook-up in the malls, from which the mall owners could resell the power to the individual mall tenants:

> What the Malls wish to do is to pre-empt the utility's business for their own profit, not as true competitors for the same market.
>
> We hold that appellants have proven no antitrust violation and no antitrust injury.
>
> The trial court noted, and we agree, that the activity sought by the appellants is more akin to mere "substitution" than to competition. By achieving the goal to resell electricity on the retail level, appellants will be merely plugging themselves into the flow of electricity and reaping profits as non-competitive middlemen.

615 F.2d at 353.

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infra, 7a. YPCC could impose no such discipline on GTE/DC. Indeed, the economically rational response of GTE/DC to YPCC's activities would be to *increase* its prices to recover revenues lost as a consequence of YPCC's consulting activities. As a matter of economics, YPCC's presence has no effect whatsoever on GTE/DC's ability to raise prices or reduce output.

The *HyPoint* and *Almeda Mall* courts both expressly considered and rejected, as a matter of law, the precise argument adopted by the Ninth Circuit in the instant case, *i.e.*, that noncompetitive middlemen can sustain antitrust injury as a consequence of actions taken by sellers to deal directly with their own customers. Indeed, the facts of this case argue more strongly against antitrust injury than either *HyPoint* or *Almeda Mall*, since YPCC operates not as an independent actor attempting to compete with the seller, but rather as someone acting on the buyer's behalf to purchase the seller's product. The courts have never granted antitrust standing to an agent for a purchaser in case such as this.

The conflict raised by the Ninth Circuit's holding in this case is not a mere technical dispute, but goes to the heart of federal antitrust enforcement. As this Court stated in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 487 (1977), to hold compensable *any* loss related to challenged conduct, without inquiring into the effects on competition and the relationship of the plaintiff's injury to those effects, would "divorce[] antitrust recovery from the purposes of the antitrust laws, . . . make § 4 recovery entirely fortuitous, and . . . authorize damages for losses which are of no concern to the antitrust laws." This Court should entertain GTE/DC's petition in order to reconcile the conflict between the courts of appeals, and to reaffirm the importance of antitrust injury to the maintenance of a Clayton Act § 4 lawsuit.

2. The Ninth Circuit's Conclusion That YPCC Competes With GTE/DC Expands The Scope of Antitrust Standing In A Manner That Conflicts With The Antitrust Jurisprudence Of This Court As Well As With Decisions Of The Fifth, Eighth and Eleventh Circuits.

Antitrust injury is not the only legal obstacle that an antitrust plaintiff must overcome in order to establish antitrust standing under § 4 of the Clayton Act. The plaintiff must establish that it participates in the same economic market, *i.e.*, that it competes with or is a customer of, the defendant whose conduct is being challenging. *Contractors*, 459 U.S. at 538. In this case YPCC argued, and the Ninth Circuit accepted, that because YPCC and GTE/DC share common customers, because YPCC's efforts are directed towards deflecting a portion of GTE/DC's advertising revenues into YPCC's pockets, and because GTE/DC's internal documents referred to YPCC as "competition", a jury should be allowed to conclude that YPCC competes in a "consulting" market with GTE/DC.

The Ninth Circuit's adoption of this argument is at odds with this Court's analysis of antitrust markets and submarkets, and lacks any grounding whatsoever in economic theory. Furthermore, the holding that independent middleman can be found to be competitors of a seller squarely conflicts with decisions of the Sixth, Eighth and Eleventh Circuits, each of which has held that brokers, agents or middlemen who place themselves between buyers and sellers do not compete with the seller in any economic sense.

a. The Conclusion Below That Cost Consultants Compete With GTE/DC In A Market Consisting Of The Provision Of Advice To Yellow Pages Advertisers Is Incompatible With This Court's Teachings Concerning The Proper Definition Of Antitrust Markets.

The Ninth Circuit's conclusion that GTE/DC markets a product consisting of "consulting" that can somehow be severed from the function of selling yellow pages advertising, and that GTE/DC therefore competes in a "consulting market" with YPCC, completely lacks economic grounding and creates dangerous antitrust precedent that should be corrected. Because the record cannot support a suggestion that yellow pages advertisers perceive the GTE/DC sales presentation as a product that is separate and distinct from the advertising product itself, YPCC's effort artificially to extract an inseparable segment of GTE/DC's product should not be sustained.[11]

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[11] The Ninth Circuit concluded that a jury question was raised by virtue of characterizations made by certain GTE/DC personnel or found in GTE/DC documents suggesting that YPCC was a "competitor" of GTE/DC. However, the courts have recognized that "common words may take on unaccustomed meanings in particular legal settings." *United States v. Natanel*, 938 F.2d 302, 311 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 986 (1992). Indeed this Court's decision in *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964), rejected the adoption of economically untenable conclusions based upon characterizations utilized by the parties. *See also Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1224 (8th Cir. 1987) (party's economic function is "based on the substance of the economic relationship" rather than "the terms the parties used to characterize" the relationship), *cert. denied*, 486 U.S. 1026 (1988); *Evans v. Tubbe*, 657 F.2d 661 (5th Cir. 1981) ("[a]t most, the plaintiffs' lay 'admissions' testimony illustrates only that these non-lawyers misunderstood the legal term of art"); *see also HyPoint Technology*

This Court in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), addressed the question of when products should be viewed as separate in the context of a Sherman Act § 1 tying case. That analysis applies with equal force here, and demonstrates that GTE/DC does not compete in a "consulting" market with YPCC. In *Jefferson Parish*, the Court held that the proper focus of any inquiry concerning whether a product is a single product or two separate products is the "character of the [consumer] demand for the two items." 466 U.S. at 19. Underscoring this inquiry into whether there are "two distinct markets for products [offered by the seller] in the eyes of-buyers," 466 U.S at 19, three concurring Justices emphasized that:

> there must be a coherent economic basis for treating the . . . products as distinct. All but the simplest products can be broken down into two or more components that are "tied together" in the final sale. Unless it is to be illegal to sell cars with engines or cameras with lenses, this analysis must be guided by some limiting principle. For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.* When the tied product has no use other than in conjunction with the tying product, a seller of

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v. Hewlett Packard Co., 949 F.2d, *supra* at 877-78, observing that a company that sells Hewlett-Packard service contracts for less money and collect a middleman's profit competes with Hewlett-Packard "in a semantic sense, but not as a matter of economics."

> the tying product can acquire no *additional* market power by selling the two products together.

466 U.S. at 39 (concurring opinion of Justices Rehnquist, O'Connor and Powell) (emphasis in original).

There is no "coherent economic basis" for concluding that customers would be interested in purchasing the advice that GTE/DC's sales personnel give concerning how best to maximize the value of their yellow pages advertising dollar without also purchasing GTE/DC's yellow pages advertising. GTE/DC's sales pitch for its products is not offered apart from the advertising, it is not sought by advertisers separately from the advertising, and it is utterly without any value when separated from the purchase of advertising. There is nothing in the record that would suggest that prospective advertisers who meet with GTE/DC sales personnel yet ultimately decide *not* to purchase advertising are billed for the GTE/DC sales effort.[12] The GTE/DC sales presentation has no use to consumers other than in conjunction with the sale of GTE/DC advertising itself. YPCC has offered and can offer no evidence that there is a separate demand for the sales presentation *and* the advertising product.

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[12] One of the principal fallacies of the Ninth Circuit's decision is the importance it places upon testimony of a GTE/DC witness who testified that the cost of GTE/DC's sales efforts are covered by the rates GTE/DC charges for its advertisements. The Ninth Circuit perceived this as evidence that GTE/DC simply "bills differently" for its consulting service. App. A, *infra*, 6a. But this assumes, erroneously, that everyone who receives a GTE/DC sales presentation also acquires advertising. Under the Ninth Circuit's approach, *all* components of a product whose costs are attributed to the overall charge for the product are, in fact, separate products. Such a conclusion is economic nonsense, and has been repudiated by this Court's decision in *Jefferson Parish*.

It is absurd to conclude that the seller of a product has actually sold two separate products, *viz.*, the product itself and the selling of that product. To invite a jury to arrive at such a preposterous result would repudiate this Court's express admonition in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), that a party cannot defeat summary judgment on the basis of a claim that makes no economic sense.

The fundamental economic fallacy endorsed by the Ninth Circuit that GTE/DC's advertising product can be fragmented according to the type of information imparted to customers by sales personnel would convert salesmen into conglomerates who compete in markets they never imagined.[13] Yet acceptance of this untenable economic proposition led the Ninth Circuit to conclude erroneously that GTE/DC competes with YPCC in a discrete market in which it has never participated. This, in turn, led the Ninth Circuit to hold that YPCC possesses standing to challenge GTE/DC's alleged monopolization of a market in which it does not even compete. The net effect of this holding is to deprive the antitrust standing doctrine of force or meaning.

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[13] The Ninth Circuit's holding that consultants compete with sellers in a market for providing advice to customers would yield perverse consequences. For example, automobile manufacturers seeking to avoid possible criminal price fixing liability may refuse to disclose price and cost data to their newly designated competitor, *Road and Track Magazine*. The result of this would be the dissemination of *less* information to consumers—a consequence not consistent with the consumer oriented goals of the antitrust laws.

b. The Conclusion Below That Middlemen Compete With Sellers Conflicts With Decisions To The Contrary By The Fifth, Eighth And Eleventh Circuits.

In holding that middlemen such as YPCC compete with sellers such as GTE/DC for purposes of being able to assert a claim under § 4 of the Clayton Act, the Ninth Circuit has created a new category of antitrust plaintiffs. Although this Court has never directly addressed this issue, the courts of appeals that have considered this question have each refused to classify middlemen as competitors.

The Eleventh Circuit addressed this issue most directly in *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corporation*, 849 F.2d 1336 (11th Cir. 1987). In that case Ad-Vantage, a company authorized to sell national advertising on behalf of GTE/DC, brought a federal and state monopolization claim against GTE/DC after GTE/DC decided that it would begin billing advertisers directly for advertisements submitted through Ad-Vantage, and that future orders submitted by Ad-Vantage must be accompanied by an advance payment, or a guarantee of payment by the advertiser.

The Court of Appeals reversed a jury verdict finding GTE/DC guilty of unlawful monopolization.[14] The court specifically rejected *Ad-Vantage's* attempt ar-

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[14] The verdict was returned for plaintiff under Florida's antitrust laws rather than under the Sherman Act because the alleged offense occurred within the boundaries of the State of Florida. However, the antitrust analysis performed by the Eleventh Circuit applied Sherman Act § 2 precedent, since the Florida legislature "adopted as the law of Florida the body of antitrust law developed by the federal courts under the Sherman Act." 849 F.2d at 1341.

tificially to fracture the product sold by GTE/DC into a publishing component and a sales component, so that it could position itself as a competitor of GTE/DC in the sales component market. The Eleventh Circuit also went on to hold that even if the market could be fragmented in this fashion, Ad-Vantage would be nothing more than an agent—either a sales agent for GTE/DC, 849 F.2d at 1346, or a purchasing agent for advertisers, *id.* at 1347—and thus as a matter of law could not be held to compete with GTE/DC. *Id.*

Specifically, in response to the precise argument successfully advanced in the instant case, the Eleventh Circuit in *Ad-Vantage* stated that:

> There is some evidence in the record to indicate that [Ad-Vantage], when purchasing advertisements on behalf of an advertiser, is acting as an agent for the advertiser. . . . However, this does not establish that a dual distribution system existed; it merely means that all advertising was purchased directly from the publisher, and that the advertisers who dealt through [Ad-Vantage] had an agent acting on their behalf. Either way, [Ad-Vantage] functions as an agent, not an "independent contractor," and not, in any case, as a retailer of yellow pages advertising space.

849 F.2d 1347. Accordingly, the Eleventh Circuit rejected as a matter of law Ad-Vantage's effort to convert a middleman relationship into a separate product market in which GTE/DC and the middleman purportedly compete.

Other courts have reached the same conclusion. As discussed earlier, the Fifth Circuit rejected efforts by

shopping mall owners to fashion themselves as "competitors" of an electrical utility in order to sue the utility under the antitrust laws. In *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, *supra*, as in this case, the plaintiff did not produce a competing product but rather sought to step between the seller and the buyer in order to draw profits away from the seller. The court properly rejected the malls' attempt to preempt the utility's business and fashion themselves as competitors. Rather, the court concluded that the malls were seeking to operate as "non-competitive middlem[e]n" and "not as true competitors for the same market." 615 F.2d at 353.[15]

Similarly, in *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987), the Eighth Circuit held that a brokerage firm that promoted direct sales of pet supplies from manufacturers to retailers was neither a customer nor a competitor of the manufacturer, and thus lacked antitrust standing to challenge its termination as a broker by the manufacturer. The Court held that the broker:

> "did not buy and sell pet products but instead earned commissions by promoting direct sales to retailers of certain products . . . . [E]ven if [the broker's] injury was a necessary step for the defendant to take in achieving the overall suppression of the market . . . [the broker] was not a consumer of goods or services subject to restraint or an injured competitor of Hartz, the party engaging in the claimed restraint."

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[15] *See also*, *HyPoint*, 949 F.2d, *supra* at 877-78 (concluding that HyPoint competes with Hewlett-Packard "in a semantic sense, but not as a matter of economics").

810 F.2d at 809 [citation omitted].

The plaintiffs in this case occupy precisely the same position in the economic environment as the plaintiffs in *Almeda Mall*, *Ad-Vantage*, *HyPoint* and *Hartz Mountain*. YPCC was not selling a separate product. Rather, it was attempting to rebroker an existing product and reap profits as a middleman. But the Ninth Circuit departed from the analysis accepted by the Courts of Appeals in those cases. Instead, it adopted the theory that brokerage activity might convert the broker, who in this case is merely an agent for the purchaser, into a competitor of the seller who can sue the seller under the antitrust laws for doing nothing more sinister than insisting on entering into direct relationships with its customers. This holding represents an unprecedented expansion of the doctrine of antitrust standing that raises a direct conflict among the Circuits, and undermines this Court's carefully reasoned standing jurisprudence.

Indeed, YPCC's own allegations highlight the overly expansive approach taken by the Ninth Circuit to the issue of antitrust standing, since the record is clear that YPCC's alleged injuries have purportedly flowed entirely from its inability to sign contracts with GTE/DC on behalf of its clients. GTE/DC did nothing to inhibit YPCC from advising "businesses on the content and form of their advertisements in yellow pages directories," App. A *infra*, 2a, although this is the precise "market" in which YPCC alleges it competes with GTE/DC. While GTE/DC's insistence on entering into contracts with its customers may have impaired YPCC's ability to "place[] such advertisements [on behalf of its customers] with directories published by

GTE," *id.*, this simply proves that YPCC was not injured in the cost consulting aspect of its business, but *solely* in its middleman role.

B. The Ninth Circuit's Holding Undermines The Fundamental Goals And Purposes Of The Federal Antitrust Laws As This Court Has Defined Them.

This Court often has cautioned that the antitrust laws must not be utilized in a manner that would retard and inhibit, rather than foster, economic growth, innovation and development. *See, e.g., United States v. National Lead Co.*, 332 U.S. 319, 359 (1947); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 282-83 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Thus, the Court has upheld the right of a manufacturer unilaterally to impose nonprice restraints on its distributors, recognizing that nonprice vertical restraints may promote interbrand competition while discouraging intrabrand free riding by distributors who do not wish to invest in product support activities. *See, e.g., Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-25 (1988).

The Ninth Circuit's holding in this case grants antitrust standing to free riders by allowing free riders to seek treble damages for the consequences of what can be characterized, at worst, as a manufacturer's unilateral attempt to protect its capital investment from the parasitic intervention of parties who have no similar investment at stake. As such, it turns the antitrust laws inside out by rewarding the free rider and punishing the innovator.[16]

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[16] The Seventh Circuit recently refused to award a terminated dealer antitrust damages that included free-rider profits: "The prevention of free riding is not, as yet anyway, a defense to a

The facts of the comparable cases discussed above highlight this point. In each case, the plaintiff was a party that had little or no capital investment in the product or service at issue. The defendant was a party that had significant capital invested in the product or service at issue. In *HyPoint*, for example, it was Hewlett-Packard that invested in and provided the service for which HyPoint's customers were paying; Hypoint was simply acting, for a fee, as a conduit between owners of Hewlett-Packard microcomputers and Hewlett-Packard's service department, which performed the repair work on the equipment that was being serviced. Similarly, in *Almeda Mall*, the plaintiffs had made no investment to become electrical utilities. Rather, they were seeking to free ride on Houston Lighting's significant investment as an electric utility by routing its power through their own switch to individual store owners and collecting revenue properly belonging to Houston Lighting.

This case is no different. GTE/DC's directory publication operation, which includes solicitation and packaging of orders, and printing and distribution of directories on a continuous and ongoing basis, requires a significant investment of resources. YPCC, whose business is telling customers how to purchase less yellow pages advertising from GTE/DC, involves no such investment. Rather, it involves only the modest task of identifying yellow pages advertisers (apparent from a perusal of any yellow pages directory,

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charge of resale price maintenance; but neither is being prevented from taking a free ride on another dealer's efforts a form of antitrust injury compensable by a damage award." *Isaksen v. Vermont Castings Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

provided free of charge to anyone by GTE/DC), calling prospective clients, and encouraging them to purchase less of GTE/DC's product.[17] As the Fifth and Sixth Circuits have recognized, and as the Ninth Circuit failed to comprehend, the antitrust laws are not intended to facilitate such free riding by imposing treble damage liability one's decision to deal directly with one's own customers.

CONCLUSION

By overturning summary judgment in this case, the Ninth Circuit has created a new and potentially limitless category of antitrust plaintiffs, and has turned its back on this Court's admonition in *Matsushita* that summary judgment is an appropriate and necessary tool with which to discourage economically and legally untenable antitrust cases. The decision below inevitably will spawn a deluge of litigation involving creative yet economically unrealistic fabrications of fictitious markets and submarkets for the purpose of sustaining otherwise unmaintainable antitrust actions. The result is a reward to free riders and a disincentive to capital investment, innovation and growth. This Court should grant this petition to eliminate the confusion created by this decision and to prevent a misguided misinterpretation from giving birth to a new generation of counterproductive antitrust suits.

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[17] In fact, as YPCC itself has acknowledged, each of the plaintiffs in this case is a former employee of a yellow pages directory company. App. A, *infra*, 2a. Thus, GTE invested its own resources to provide free training to parties who utilize the knowledge gained while employees of directory companies to cut into GTE/DC's profits. In this light, YPCC is the ultimate free rider.

March 18, 1992

Respectfully submitted,

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APPENDICES

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

No. 89-15796.

YELLOW PAGES COST CONSULTANTS, INC.; Media Masters, Inc.; Tel-Ad Advisors, Inc.; Southern Directory Consultants, Inc.,

Plaintiffs-Appellants,

v.

GTE DIRECTORIES CORPORATION; GTE Directories Sales Corporation; GTE National Marketing Services Corporation; GTE Directories Publishing Corporation; GTE Directories Printing Corporation; GTE Marketworld, Inc.,

Defendants-Appellees.

Argued and Submitted Feb. 14, 1991.

Decided Dec. 24, 1991.

Paul J. Kaleta, Swidler & Berlin, Washington, D.C., Joel Linzner, Khourie, Crew & Jaeger, San Francisco, Cal., for plaintiffs-appellants.

C. Douglas Floyd, Pillsbury, Madison & Sutro, San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before: FLETCHER, NORRIS and NOONAN, Circuit Judges.

WILLIAM A. NORRIS, Circuit Judge:

Defendants-Appellees GTE Directories and related corporations ("GTE") publish yellow pages directories. In those areas where it publishes the yellow pages directory as the local phone company, GTE occupies a huge market share of the yellow pages advertising market: over 98% in Anchorage, Oahu, and Tampa; 95% in Las Vegas; 77.2% in Long Beach, California. GTE salespersons offer advertisers advice on the form and content of their advertisements and place such advertisements with relevant GTE directories. GTE does not bill advertisers separately for such advice, but builds the cost into its rate structure.

Plaintiffs-Appellants are several distinct consulting firms that offer advice to businesses on advertising effectively and efficiently in yellow pages directories. For convenience, we refer to appellants Yellow Page Cost Consultants, Media Masters, Inc., Tel-Ad Advisors, Inc., and Southern Directory Consultants, Inc., as "Consultants." These Consultants advise businesses on the content and form of their advertisements in yellow pages directories. Prior to a change in GTE policy, the Consultants also placed such advertisements with directories published by GTE.

In soliciting the business of advertisers, the Consultants point to their ability to fashion the most economical use of the yellow pages directories. Consultants maintain that GTE's vast market shares allow it to maintain a Byzantine pricing structure such that ads of the same size that look virtually identical and cost the same to publish vary in price by 100% or more.[1] As former sales persons for GTE, appellants tell advertisers that they can design and place ads with GTE efficiently. Indeed, Consultants charge advertisers according to the savings they provide. Collec-

[1] Appellants allege that this rate structure amounts to anticompetitive conduct, including price discrimination. We express no opinion as to the merits of these clams.

tively, Consultants not associated with GTE saved advertisers a total of $3,000,000 per year.

The instant action arose from GTE's announcement that it would end its decades-old practice of letting consultants order, place, and process yellow page advertisements on behalf of advertisers. Subsequently, some of Consultants' customers canceled their contracts, citing the added inconvenience this change created.

Consultants filed suit against GTE, seeking relief for violations of sections 1 and 2 of the Sherman Act and various state laws. The first antitrust claim, under § 2, alleged that GTE exploited its monopoly power in the yellow pages advertising market to obtain a monopoly in the separate consulting marketing by refusing to deal with consultants. The second claim, under § 1, alleged that GTE's contracts with local telephone companies, combined with the refusal to deal with consultants, amounted to an unreasonable restraint of trade. The third claim, under § 1, alleged that GTE illegally tied the sale of advertising in its yellow pages directories to utilization of the consulting services offered by its salespersons.

In its first motion for summary judgment, GTE argued that there was no separate market for consulting services for yellow pages advertisers and, alternatively, that if such a market existed, GTE did not compete in it. GTE argued that the "key fact" was that GTE could not compete with consultants because the advice consultants offered was "independent" and designed to "maintain the effectiveness of . . . advertising for less money," *see* Excerpts of Record ("ER") at 52. Although the motion itself did not explicitly mention "standing," Judge Ingram raised the question of antitrust standing at argument, and GTE opined that the Consultants lacked standing. Judge Ingram denied GTE's motion for summary judgment, specifically noting that tri-

able issues of fact remained on whether GTE and Consultants were competitors.[2]

Upon transfer of the case to Judge Orrick, GTE renewed its motion for summary judgment. GTE argued that the relevant market for Consultants' services was that of offering independent advice on reducing yellow pages costs and that it could not compete in the market so defined because its salespersons were not independent of it. Consultants replied that the relevant product market did not turn on independence, but consisted of "advice to advertisers, regarding the form, content and location of their ads as well as placement of the ads." ER 134.

Judge Orrick awarded summary judgment to GTE on the ground that Consultants had failed to present triable issues of fact on antitrust injury and antitrust standing; he also declined to accept jurisdiction over the pendent state law claims. *See Yellow Pages Cost Consultants v. GTE Directories,* 716 F.Supp. 1306, 1308 (N.D.Cal.1989).

We review *de novo* the district court's summary judgment, "view[ing] the evidence presented in the light most favorable to the [non-moving parties] to determine if there is a genuine issue of material fact and, if not, whether [the moving party] is clearly entitled to prevail as a matter of law." *Chelson v. Oregonian Publishing Co.,* 715 F.2d 1368, 1370 (9th Cir.1983).[3] We reverse.

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[2] Judge Ingram's subsequent rulings strongly suggest that he viewed GTE's first summary judgment motion as raising the question of Consultants' antitrust standing. In response to GTE's subsequent motion to dismiss, arguing that Consultants lacked antitrust standing because they did not compete in a relevant market, Judge Ingram refused to consider the motion because it came after the motion cut-off date and "contain[ed] material raised in prior summary judgment motions denied by this court." ER 90-91.

[3] Accordingly, the facts as stated in this opinion are ones that are either not contested for summary judgment purposes or ones that a trier of fact could find based on the evidence proffered in support of, or in opposition to, the motion for summary judgment.

I

We think the district court erred in concluding that Consultants and GTE do not compete. The court stated that most of the evidence that showed that GTE did not compete came from Consultants' statements that advertisers could get a better deal by using their services rather than relying only on GTE's salespersons. 716 F.Supp. at 1309. This evidence does not show that Consultants offer *different* services from GTE; it only shows that Consultants think they offer *better* services.

Consultants offer considerable evidence that they compete in the service market of advising advertisers regarding the form, cost, content and location of yellow pages advertisements and, prior to GTE's refusal to deal with consultants, placing the ads in yellow pages publications. For instance, a GTE policy manual included under "Competition-Countering Guidelines" several procedures "proven effective" in combatting competition. The manual recommended that the following letter be sent to advertisers who had retained consultants for the prior year's directory:

> Dear Customer:
>
> GTE Directories Corporation invites you to handle your yellow pages advertising directly with one of our trained professional representatives. As you know, there are no service fees, commissions, or other hidden charges when you place your advertising directly with GTE Directories Corporation. Some agencies, however, will charge you an extra fee to do exactly what GTE Directories corporations can do.

GTE also recommended that its employees tell advertisers, "We'll work with you to modify, streamline and yes, even reduce your yellow pages advertising program. . . ." ER 531. GTE officials also gave deposition testimony that they would work to reduce an advertising program if advertisers wanted to do so.

Against this evidence, GTE places great weight on the Consultants' method of calculating its fees. "The simple fact that plaintiffs were paid as a percentage of reduced expenditures," it argues, "demonstrates eloquently that layout and design had nothing to do with their efforts to compete." Brief of Appellee at 14. At best, GTE's argument is *one* inference available to the trier of fact. A trier of fact might also reasonably conclude that the different billing practices reflect different strategies for marketing services that are essentially identical. Consultants' unusual method of billing accords with their claim that they can reduce overall expenditures on yellow pages advertising without compromising effectiveness. GTE bills differently. The president of a GTE subsidiary admitted that the cost of its "free advertising consulting service," as GTE fashioned its service in letters to advertisers, was covered by the rates for its yellow pages advertisements. GTE has cited no authority that a trier of fact could not conclude that otherwise identical services are distinct because one party charges for them as part of a package of products and the other charges for them separately in accordance with a different marketing scheme.

Similarly, we disagree with the district court's contention that a trier of fact could not find that GTE and Consultants compete in the market for yellow pages' advice because they do not supply advertisers with identical recommendations. The district court implicitly defined the scope of the market for yellow pages consulting according to the content of the recommendations offered. It therefore defined the market for Consultants services as the sale of "advice to advertisers on how to reduce the cost of their advertisements." 716 F.Supp. at 1309. A trier of fact, however, could reasonably accept the analysis offered by one of Consultants' experts:

> The fact . . . [GTE] generally advises its customers to spend greater amounts for Yellow Pages advertising, while Yellow Pages consultants generally advise their

> customers to spend lesser amounts, does not put GTEDC and Yellow Pages consultants in separate markets. At any given time, some stockbrokers are telling their clients to sell, while other stockbrokers are telling their clients to buy. Yet both bull and bear stockbrokers are competing in a single market for investment advisement services.

ER 331.

Finally, at a more abstract level, we disagree with the district court's reasoning that GTE's references to Consultants as competitors denoted only a "rival, someone working against one's interest, but not the more technical antitrust competitor." 716 F.Supp. at 1310. As we have noted before, the "field of competition [includes] . . . the group or groups of sellers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Industries, Inc. v. Pay N' Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir.1989) (declining to recognize "home center stores" as distinct market when other retail stores offered some similar goods even if not the full range of goods and services available at home center stores). Moreover, Consultants also serve the function of competitors we identified in *U.S. v. Syufy Enters.*, 903 F.2d 659, 662-63 (9th Cir.1990), of imposing "an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost . . . ."

II

Having concluded that Consultants suffered antitrust injury, we turn to GTE's argument that other factors "confirm" their argument that the Consultants are not appropriate antitrust plaintiffs.[4] We conclude that these

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[4] In determining whether a party has standing to bring an antitrust suit, we examine five factors:

remaining arguments confirm that Consultants are indeed appropriate antitrust plaintiffs.

First, GTE contends that Consultants have not suffered direct injury because any injury to Consultants was derivative of injury to their clients. The district court held that the "injury that flows from . . . [GTE's refusal to deal] is that advertisers will have to pay more than they would have. . . . [but because Consultants] are paid with a percentage of the savings to the advertiser, [they] suffer injury only if the advertiser is injured. . . ." 716 F.Supp. at 1313.

We disagree. As we stated in *R.C. Dick*, "[d]irectness in the antitrust context means 'close in the chain of causation.' " 890 F.2d at 147 (quoting *Associated General Contractors*, 459 U.S. at 540, 103 S.Ct. at 909). There could hardly be a closer causal link than the one between GTE's refusal to let Consultants place advertisements for their clients and their clients' canceling contracts in letters to Consultants that mention the GTE policy change. Just as we reject GTE's argument that the method of payment resolved the competition issue, we reject the notion that Congress intended antitrust standing to turn on the method of payment used by different market actors. Such a notion would effectively deny standing to all those who charge a share of the savings they provide others.

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1. The specific intent of the alleged conspirators;
2. The directness of the injury;
3. The character of the damages, including the risk of duplicative recovery, the complexity of apportionment, and their speculative character;
4. The existence of other, more appropriate plaintiffs;
5. The nature of the plaintiff's claimed injury.

R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 146 (9th Cir.1989) (en banc) (*citing Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 908-12, 74 L.Ed.2d 73 (1983)).

The method of payment does not change our earlier analysis of retaliatory refusals to deal in *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368 (9th Cir.1983), in which we reversed summary judgment denying standing to newspaper dealers to sue a publisher who refused to deal with those who distributed a competing advertising insert. In *Chelson*, we remanded to the district court to determine if the targets of a boycott would have worked with others "but for the actions of [appellees]" because there were disputed issues of fact between the parties over whether an agreement would have been reached. *Chelson*, 715 F.2d at 1372. Although GTE may dispute the extent of losses its refusal to deal inflicted, there appears to be no issue of fact that Consultants suffered some loss as a result of GTE's refusal to deal with them.

The addition of specific intent to this direct injury also makes antitrust standing appropriate. *See Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 963 (10th Cir.1990); *R.C. Dick*, 890 F.2d at 146. An internal memorandum of GTE marked "highly confidential" discusses "agency activity" under the heading "competitive environment" and recommends "a very aggressive approach if not refus[ing] to deal with them altogether." ER 762. GTE does not contest specific intent on appeal.

We next consider the character of damages, including "the risk of duplicative recovery, the complexity of apportionment, and their speculative character." *R.C. Dick*, 890 F.2d at 146. The district court expressed a concern that Consultants and advertisers could claim the same damages. *See* 716 F.Supp. at 1314. One example, however, dispels this fear. An advertiser with a yellow pages advertising budget of $1,000 might pay that entire sum to GTE rather than use Consultants because of the inconvenience caused by GTE's refusal to let Consultants place ads with them on its behalf. Had GTE allowed Consultants to place the ads, causing the advertiser to use Consultants, it might have paid only $500 to GTE and $200 to Con-

sultants and retained $300 itself. The Consultants would recover the $200 in the instant suit; the advertiser might recover $300 in a subsequent suit. From this perspective, Consultants' antitrust action presents no unusually difficult apportionment problems.

The district court also applied too strict a standard in holding that Consultants' damages were speculative. Despite evidence that particular clients canceled their contracts with Consultants, as well as evidence of a decline in overall revenues, the court held that the Consultants' claims were speculative because their expert conceded that other factors might have contributed to the revenue drop. *See* 716 F.Supp. at 1314. This holding disregards our rule that "[an antitrust] plaintiff [attempting to establish the amount of damages] need not negative all possible alterntive explanations for his decline in profits." *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir.1976). *See also Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946) (jury may base antitrust damages on "just and reasonable estimate" when defendant's actions have prevented more precise computation).

Finally, we disagree with the district court's conclusion that advertisers were more appropriate antitrust plaintiffs because they were "persons more obviously suffering antitrust injury" and therefore better poised to vindicate the public interest in antitrust enforcement.[5] The district court held that the advertisers were more interested than Consultants in increasing competition in the yellow pages advertising market, since increased competition and thus,

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[5] *See generally Associated General Contractors of California*, 459 U.S. at 542, 103 S.Ct. at 910 ("The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.").

presumably, less confusing rate structures, would reduce the demand for Consultants' services. *See* 716 F.Supp. at 1313. This would prove far too much: since every competitor ideally prefers not greater competition, but that it reap the benefits of monopoly, no competitor would ever have standing under the district court's reasoning.

Such analysis mistakes why we consider the factor of more appropriate plaintiffs. The factor is not, as the analysis would suggest, an exercise in identifying the select, in the style of a 17th Century Puritan village and its theological musings. It is instead an attempt to ensure antitrust violations will, in fact, be identified and remedied in our own Twentieth Century world of imperfect competition as understood by modern economics. In *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir.1984), we held that a blacklisted manager had standing to challenge restraint on competition in the product market for labels even though that restraint presumably hurt others as well. We did not grant Ostrofe standing in recognition of his virtue for exposing the price rigging conspiracy there.

> Presumably others were also victimized by the price fixing conspiracy, but it is unlikely that any other victim with knowledge of the conspiracy sustained a kind of injury that would give him equal incentive to bring the antitrust violator to account. Denying standing to one in the position of Ostrofe and others similarly situated is "likely to leave a significant antitrust violation undetected or unremedied."

Ostrofe, 740 F.2d at 747 (quoting *Associated General Contractors*, 459 U.S. at 541, 103 S.Ct. at 910). Similarly, failure to allow Consultants standing would raise a serious danger that alleged antitrust violations would go unremedied. We refuse to rely on the speculation that some individual advertiser would have lost sufficient money from GTE's refusal to deal with Consultants to provide it with an adequate incentive to bring suit.

III

Consultants suffered antitrust injury as competitors with GTE for providing consulting services to advertisers in yellow pages directories. No other relevant factor counsels against finding standing. Accordingly, the judgment of the district court is VACATED, and the case is REMANDED for proceedings consistent with this opinion.

APPENDIX B

United States District Court
N.D. California.

No. C-89-0553 WHO.

YELLOW PAGES COST CONSULTANTS; Media Masters, Inc.; Tel-Ad Advisors, Inc.; Southern Directory Consultants, Inc.; Tel-Ad Advisors Southwest, Inc.,

Plaintiffs,

v.

GTE DIRECTORIES CORPORATION; GTE Directories Sales Corporation; GTE National Marketing Services Corporation; GTE Directories Publishing Corporation; GTE Directories Printing Corporation; and GTE Marketworld, Inc.,

Defendants.

May 26, 1989.

Joel Linzner, Khourie, Crew & Jaeger, San Francisco, Cal., for plaintiffs.

Robert E. Cooper, J. Feld Stepp, Jr., William E. Wegner and Elizabeth A. Grimes, Gibson, Dunn & Crutcher, Los Angeles, Cal., for defendants.

OPINION AND ORDER

ORRICK, District Judge.

Plaintiffs, Yellow Pages Cost Consultants, Media Masters, Inc., Tel-Ad Advisors, Inc., Southern Directory Consultants, Inc., and Tel-Ad Advisors Southwest, Inc.,

brought this antitrust action against defendants, GTE Directories Corporation and its subsidiary corporations (hereinafter referred to collectively as "GTE/DC"), alleging violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and state antitrust laws, as well as alleging pendent state causes of action for inducing breach of contract, interference with prospective business advantage, and unfair competition. The first antitrust claim, under § 2 of the Sherman Act, alleges that GTE/DC used it monopoly power in the yellow pages advertising market to obtain a monopoly in the separate consulting market by refusing to deal with plaintiffs in their capacity as agents for the advertisers. The second claim, under § 1 of the Sherman Act, alleges that GTE/DC's contracts with the local telephone companies, in conjunction with its refusal to deal with plaintiffs described above, amounted to a restraint of trade. The third claim, under § 1 of the Sherman Act, alleges that GTE/DC illegally tied its sale of yellow pages advertising to the utilization of its "free" consulting service.

GTE/DC filed motions for summary judgment on the issue of whether or not plaintiffs have antitrust standing; whether or not plaintiffs have suffered antitrust injury; and whether or not plaintiffs' damage study should be excluded. The Court finds that plaintiffs do not have antitrust standing and, therefore, the Court dismisses the antitrust claims. The antitrust injury issue is analyzed as part of the antitrust standing issue. The damage issue need not be resolved because of the Court's finding that there is no antitrust standing. The Court declines to accept pendent jurisdiction over the remaining state claims.

I.

Plaintiffs are independent consultants who provide advertisers with advice on how to reduce the cost of their yellow pages advertising. Advertisers hire plaintiffs to work directly with GTE/DC as the advertisers' authorized agent.

Plaintiffs are paid a percentage of the advertisers' savings. Their services have been well received due to the complex pricing structure of yellow pages advertising.

GTE/DC sells yellow pages advertising and publishes yellow pages directories. In April 1985, apparently in response to plaintiffs' successful ability to reduce the amount advertisers spend on yellow pages advertising, GTE/DC announced that it would only sign contracts for yellow pages advertising with the advertisers and not with the advertisers' authorized agents such as plaintiffs. GTE/DC did not, however, do anything else to restrict advertisers' use of plaintiffs' services. This action prompted plaintiffs to file this antitrust suit.

II.

The central issue before the Court is whether plaintiffs have antitrust standing. The United States Supreme Court broadly discussed five factors to evaluate on a case-by-case basis the question of whether a plaintiff has antitrust standing. The Ninth Circuit has formulated these factors as: (1) the nature of the plaintiffs' alleged injury—whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir.1987), citing *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538-40, 103 S.Ct. 897, 908-10, 74 L.Ed.2d 723 (1983). Courts should analyze antitrust standing questions by considering all the above factors, keeping in mind that not all the factors are required and not one factor is dispositive. *Lucas v. Bechtel Corp.* 800 F.2d 839, 845 (9th Cir.1986).

A.

The first factor, that the alleged injury be of the type that antitrust laws were intended to forestall, has as its

natural corollary "that the injured party be a participant in the same market as the alleged malefactors." *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).

GTE/DC first argues that plaintiffs do not satisfy this factor on the theory that plaintiffs and GTE/DC are not participants in the same market.[1] Plaintiffs contend that a market exists for yellow pages consulting services separate from the yellow pages advertising market. Neither the existence of this consulting market nor plaintiffs' participation in it is in dispute. The only issue is whether or not GTE/DC, the seller of yellow pages advertising, is a participant in this separate consulting market.

Plaintiffs' argument that GTE/DC is in the consulting market fails to make both economic sense and common sense. GTE/DC sells yellow pages advertising to advertisers. Its goal, as is that of any business, is to sell as much advertising as it can. It has created a complex pricing structure for its advertisements. In response to this pricing

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[1] Judge Ingram, who had the case before it was transferred, issued an Order stating:

> [T]he court cannot find on the present record that plaintiffs and defendants are not in competition with each other. The material facts in the record are in conflict as to whether such competition exists. *Best Advertising Corp. v. Illinois Bell Co., supra*, and *AdVantage Telephone Directory Corp. Consultants v. GTE Directories Corporation, supra*, would tend to support a holding that such competition does not exist, but this court finds a trial is necessary to determine whether the facts in this proceeding meet the criterion of those cases.

Order filed Jan. 27, 1988, at 5-6.
Despite plaintiffs' attempt to characterize this ruling as a finding that plaintiffs and GTE/DC are in the same market, Judge Ingram only found that the parties *could* be in the same market.
The Court previously stated it would follow Judge Ingram's ruling. Reviewing the market issue in the antitrust standing context that was not before Judge Ingram, however, the Court finds this issue can be resolved on the present record.

structure, plaintiffs have created businesses that sell advice to the same advertisers on how to reduce the cost of their advertisements. The goals of these services are obviously in direct conflict with GTE/DC's goal of selling as much advertising as it can. Plaintiffs would want the Court to believe that in addition to selling advertising, GTE/DC also provides advice to advertisers on how to reduce its own sales. That argument simply defies both economic and common sense.[2]

The Supreme Court has dealt with the question of summary judgment in an antitrust case in which a claim did not make economic sense. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), the Court held:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more that simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Where

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[2] Common sense dictates that a seller of goods cannot and will not advise its customers to significantly reduce their purchases. This is especially true in a situation, as we have here, in which the salesperson works for a commission. In fact, if GTE/DC provided similar advice as the plaintiffs to reduce its advertisers' rates, then the need for the entire industry of independent consultants would not exist.

Simply put, if one was buying a car from a salesperson, would one expect to ask and receive worthwhile advice from that salesperson on how to bargain with him to reduce the price of the car? Of course not. The seller and the buyer are on opposite sides on the transaction. As Justice Douglas once stated, "That seems to us to be the common sense of the matter; and common sense often makes good law." *Peak v. United States,* 353 U.S. 43, 46, 77 S.Ct. 613, 615, 1 L.Ed.2d 631 (1957). It seems to the Court that common sense dictates that GTE/DC cannot be and is not in the market providing advice on how advertisers can lower their cost on advertisements purchased from GTE/DC.

> the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."
>
> If follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. . . .

(Citations omitted.) In this case, because plaintiffs' argument that GTE/DC is in this consulting market makes no economic sense, plaintiffs' burden for showing specific facts is much greater than in an ordinary case.

GTE/DC presents a great deal of evidence to support the Court's conclusion that GTE/DC is not in the consulting market. Most of that evidence comes from representatives of plaintiffs themselves who acknowledge that it would be impossible for GTE/DC to provide the same service that plaintiffs provide. Lambert Stead, owner of Yellow Pages Cost Consultants, stated:

> GTE cannot make the same kind of cost-effective recommendations that we would make.
>
> For example, a GTE representative will never recommend to a customer that he reduce the size of his ad. . . . It's self-evident. He is a salesman. He makes a commission by selling. . . . Well, I have talked to a lot of clients, and I have yet to have on of them tell me that GTE representatives told him what we tell him.

Declaration of Mark L. Callister in Support of Defendants' Motion for Summary Judgment on Antitrust Standing, filed Apr. 24, 1989, Exh. 9 at 71-72 (hereinafter cited as "Callister Declaration"). Bertabelle Stead, President of Yellow Pages Cost Consultants, stated:

> [T]he essential difference [between plaintiffs' service and the service offered by GTE/DC] is that [plaintiffs] can tell a client ways that they can reduce their program without hurting their program. I believe that that is not something a sales rep will do or should do, since they are supposed to first protect the revenue of their company, and of course they earn their income by what they sell.

Callister Declaration, Exh. 3 at 38. Harding O'Riley, President of Media Masters, also acknowledges this difference. He answered the following question:

> Q. Is it a fair characterization of your perspective that your company offers independent consulting on yellow pages purchases as opposed on yellow pages purchases as opposed to GTE-DC which is essentially engaged in a sales effort?
>
> A. Yes.

Callister Declaration, Exh. 7 at 65. The record contains many other such statements that clearly indicate the obvious—that GTE/DC cannot sell a product and at the same time give advice on how to buy the product cheaper. One of plaintiffs' own sales brochures states this point: "It goes without saying, that no sales person, no matter which industry they represent, would willingly divulge information that might cause a customer to buy less product or service." Callister Declaration, Exh. 13 at 93.

In addition, evidence submitted by plaintiffs themselves demonstrates that advertisers do not think that plaintiffs and GTE/DC are in the same market. Jerry Miyamoto, a customer of one of the plaintiffs, wrote:

> [Plaintiff's representative] pointed out many cost savings ideas which were not explained to me by the yellow pages salesman. Since the salesman probably worked on a commission I can understand why he didn't try to help me save money.

Declaration of Joel Linzner in Opposition to GTEDC's Motions for Summary Judgment Re Standing, filed Apr. 7, 1989, Exh. 17 at 1 (hereinafter cited as "Linzner Declaration"). There are sixteen other letters in the record from advertisers that expressed similar sentiments. Linzner Declaration, Exh. 17.

From the evidence reviewed, the Court finds that GTE/DC has shown that they are not in the consulting market in which plaintiffs operate. The burden of proof, with the higher standard outlined by *Matushita,* now shifts to plaintiffs to show enough specific facts to survive summary adjudication of this issue.

Plaintiffs rely on, as their support for GTE/DC being in the consulting market, documents from GTE/DC's internal files that refer to plaintiffs as "competitors,' in a generic sense rather than in an antitrust sense, and documents that amount to nothing more than mere "puffing" on the part of GTE/DC. Plaintiffs submit an internal GTE/DC memorandum written by D.E. Ritenour, Northwestern Regional Manager of GTE Directories Corporation, to A.J. Knight. The memorandum contains a section under the heading "Competition," which contains a reference to "Agency activity." Linzner Declaration, Exh. 20, at 1. These are the agencies that include plaintiffs. There are several similar memoranda in the record. This listing of agencies as competitors, by a regional manager, is cleary made in the generic sense, as one would call anyone who was working in opposition to one's goal of maximizing sales. No reference is made to the agencies being in the same market as GTE/DC or the agencies taking business from GTE/DC in the consulting market. The word was clearly used to denote a rival, someone working against one's interest, but not the more technical antitrust competitor.

Plaintiffs next point to GTE/DC documents entitled "Domestic Sales Division Profile." Linzner Declaration, Exhs.

26-27. These documents range in time from 1981-82 through 1983-84. These reports appear to be filled out by regional sales managers for GTE/DC. Under section IIA of the form, the manager is supposed to list the "major directory publishers competing for business in the area served by your division." *Id.* The manager for the Portland division included a couple of agencies in this section as competitors. Again, because the GTE/DC form requested the listing of only publishers of yellow pages, which would be the more technical competitor in the antitrust sense, the manager's listing of agencies reflects a more generic use of the term "competitor." Obviously, the manager simply assumed a "competitor" was anyone who hurt his bottom line. This is a much broader definition than the antitrust laws encompass.[3] Therefore, these documents are not probative of the fact that GTE/DC operates in the consulting market, but only of the fact that plaintiffs are on opposite sides from GTE/DC of a seller/buyer relationship.

The next evidence that plaintiffs present can be grouped together as evidence that amounts to nothing more than sales "puffing" on the part of GTE/DC. In response to plaintiffs' success at advising advertisers on how to lower their rates, GTE/DC tried to convince advertisers that it could be trusted in its business dealings. Several letters were approved to be sent to advertisers. Linzner Declaration, Exh. 11, at GG-JJ. One such letter states in part: "Please keep in mind that GTE yellow pages provides a FREE advertising consulting service and has done so for over forty years." *Id.* at GG. Another authorized form letter states:

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[3] Plaintiffs also point to the minutes from a GTE/DC regional marketing meeting in which agencies are referred to as competitors. Linzner Declaration, Exh. 28 at D. This again is a generic use of the term that does not in any way indicate that GTE/DC competes in the same market as plaintiffs in an antitrust sense.

> GTE Directories Corporation invites you to handle your yellow pages advertising directly with one of our trained professional representatives. As you know, there are no service fees, commissions or other hidden charges when you place your advertising directly with GTE Directories Corporation. Some agencies, however, will charge you an extra fee to do exactly what GTE Directories Corporation can do.

Id. at HH. In addition to these letters, plaintiffs present advertisements by GTE/DC that carry basically the same message as the letters. Linzner Declaration, Exhs. 12-13.

The claims made by GTE/DC in the letters and advertisements are nothing more than an attempt to convince advertisers to trust GTE/DC salespeople. It is similar to a used car dealer referring to himself as "honest Abe." The advertisers, however, did not believe GTE/DC's characterization of themselves. They knew GTE/DC's goal was to maximize their sales rather than advise its customers on how to reduce their bill. Linzner Declaration, Exh. 17. GTE/DC's statements do not, therefore, amount to enough to put the question of whether GTE/DC operated in the consulting market in any doubt.[4]

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[4] In addition to the above, plaintiffs point out statements made by its two experts, Nelson R. Lipshutz and Robert G. Harris. Lipshutz states that GET/DC is in the consulting market. He relies, however, on the same evidence discussed above that the Court finds not persuasive. Linzner Declaration, Exh. 8. Lipshutz also reveals the flaw in plaintiffs' position in paragraph 11 of his declaration in which he states that after a consultant had advised an advertiser, a GTE/DC salesperson would call on the customer to rebut the advice. This was obviously done to sell more advertisements, not to offer better advice on how to further reduce the advertiser's cost. Linzner Declaration, Exh. 8 at 5.

Harris also states that GTE/DC is in the consulting market, but again undermines his own argument. Linzner Declaration, Exh. 9 at 4-5. Harris acknowledges that plaintiffs and GTE/DC have opposite incentives. GTE/DC's incentive is to increase the price of the advertisement,

Applying the high standard of *Matsushita*, the Court finds that the above evidence does not create a doubt larger than the metaphysical doubt found to be insufficient in *Matsushita*. Therefore, the Court finds that GTE/DC is not a participant in the consultant market in which plaintiffs operate.

The first factor of the antitrust standing test is actually whether the injury plaintiff suffered is one antitrust laws were intended to protect. The market question is a corollary to that. Thus, the Court directs its inquiry to the question of whether plaintiffs' injury was one the antitrust laws were designed to protect, notwithstanding the fact that the parties do not operate in the same market.

Plaintiffs first antitrust claim is a § 2 Sherman Act claim alleging that GTE/DC used its monopoly power in the yellow pages advertising market to gain a monopoly in the consulting market by refusing to deal with plaintiffs. Because the Court has determined as a matter of law that GTE/DC does not participate in the consulting market, it could not be gaining a monopoly in that market. Therefore,

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whereas plaintiffs' incentive is to decrease the price of the advertisement. To get around this hurdle, he tries to equate the situation in this case to that of the travel agent and the airline in which the agent and the airline compete in the reservation market. There is a significant difference between these two situations, which Harris even points out. In the travel agent situation, the travel agent's incentive is the same as the airline because the travel agent is being paid by the airline and not the customer as happens in the present case. In attempting to address this extremely significant difference, Harris actually proves that GTE/DC is not in the consulting market.

Harris argues that it was GTE/DC's "hard" selling practices that created a need for plaintiffs' services. Therefore, if that is true, how can GTE/DC hard sell customers and at the same time, with the same salespeople, offer advice that directly contradicts its hard sell. It cannot. Therefore, the Court finds that Lipshutz' and Harris' statements do not add anything to the argument that GTE/DC is in the consulting market.

plaintiffs injury, if any, under this claim is clearly not of the type the antitrust laws were designed to protect.

The second claim, under § 1 of the Sherman Act, alleges that a restraint of trade occurred when GTE/DC both refused to deal with plaintiffs as mentioned above and when GTE/DC conspired with the local telephone companies. The claim is presented as an aggregate of these two events. As discussed above, GTE/DC cannot create a monopoly in a market in which it does not operate and, therefore, this claim does not present injury that the antitrust laws were designed to prevent.

The third claim is a tying claim under § 1 of the Sherman Act. Plaintiffs allege that GTE/DC tied the selling of its yellow pages advertising to the "utilization" of its free consulting service. It is well settled that in order to establish an unlawful tying arrangement the following elements must be met: (1) a plaintiff must demonstrate the existence of two distinct products or services; (2) the sale of the tying product or service is conditioned on the purchase of the tied product or service; (3) the defendant has sufficient economic power in the market for the tying product to appreciably restrain competition in the market for the tied product; and (4) the amount of commerce involved in the market for the tied product is not insubstantial. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 540 (9th Cir.), *cert. denied*, 465 U.S. 1038, 104 S.Ct. 1315, 79 L.Ed.2d 712 (1983).

There are two reasons that plaintiffs' tying claim is not one that presents an injury that the antitrust statutes were designed to prevent. First, and most important, GTE/DC does not participate in the consulting market and, therefore, cannot sell a tied product or service in that market. Second, even if GTE/DC did provide a product or service in that market, it does not condition buying yellow pages advertising on buying its consulting service. This is true for two reasons. First, GTE/DC simply requires the ad-

vertiser, who is the party responsible for paying the advertising bill, to sign the contract for advertising. GTE/DC does not prohibit advertisers from purchasing advertisements if they have hired one of the plaintiffs as consultants. Second, GTE/DC does not sell a consulting service. By the evidence relied on by plaintiffs themselves to support its market claim, GTE/DC supposedly consults without charging for the service. Therefore, this is not the type of tying arrangement against which the antitrust laws were designed to protect.

Plaintiffs rely heavily on the Second Circuit opinion in *Crimpers Promotions Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir.1983), to support their argument that they have antitrust standing. That case, however, is easily distinguished from this situation. *Crimpers* involved a plaintiff who organized a cable television trade show. Defendants, Home Box Office and Showtime, both cable networks, were charged in the complaint with conspiring to create a boycott of the trade show organized by plaintiff so that they could maintain their control over producers and television stations. Crimpers' antitrust claims and the theories supporting those claims were not predicated on Crimpers proving that plaintiff and defendants were in the same market.

The situation in the present case is very different. In order to succeed on their antitrust claims, plaintiffs must prove that GTE/DC is in the same consulting market as plaintiffs. Plaintiffs want it both ways. They want the Court to find that GTE/DC is in the same market as plaintiffs and at the same time find antitrust standing based on a case in which the parties were not in the same market. Therefore, plaintiffs' reliance on a case in which standing was found when plaintiff and defendants were not in the same market is misplaced.[5]

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[5] This distinction applies to the other cases cited by plaintiffs in which

Summarizing the discussion above, the Court finds that GTE/DC is not a participant in the consulting market. Moreover, the antitrust laws were not designed to protect against the type of injury alleged by plaintiffs' claims. Thus, this first factor under the antitrust standing test supports the finding that plaintiffs do not have antitrust standing.

B.

The second factor to consider in determining antitrust standing is the directness of the antitrust injury. When considering this factor it is proper for the Court to address (1) whether the alleged injury is derivative of a direct injury to another, and (2) if there is another class of individuals who are proper parties under the private attorneys' general theory. *Eagle*, 812 F.2d at 541.

GTE/DC argues that the injury to plaintiffs were indirect because it was derivative from the injury, if any, to the advertisers. Plaintiffs argue that they suffered direct injury. The Court finds that GTE/DC's argument is the most persuasive based on plaintiffs' own allegations. Plaintiffs allege that as agents of the advertisers they are employed to assist advertisers in reducing their advertising cost. They charge a percentage of the amount saved by the advertisers. Plaintiffs further allege that because they educate advertisers regarding the costs and benefits of various forms of yellow pages advertisements, GTE/DC is less able to abuse any monopoly power it might have in the advertising market, thus saving the advertiser money. Therefore, the injury that flows from GTE/DC's alleged misconduct is that advertisers will have to pay more than

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the parties were not in the same market. *See Los Angeles Memorial Coliseum Commission v. National Football League*, 791 F.2d 1356 (9th Cir.1986); *Brokers Assistant v. Williams Real Estate Co., Inc.*, 646 F.Supp. 1110 (S.D.N.Y.1986).

they would have had to pay had GTE/DC not acted improperly. Thus, the direct injury is to the advertiser.

Plaintiffs suffer indirect injury. Their injury stems from the injury suffered from the advertisers. Because plaintiffs are paid with a percentage of the savings to the advertiser, plaintiffs suffer injury only if the advertiser is injured by not saving money due to GTE's misconduct. This injury is clearly derivative from that suffered by the advertisers.

Addressing the prong that determines whether another class of potential plaintiffs could be proper parties under the private attorneys' general theory, it is obvious that the advertisers would be proper plaintiffs under this theory. Any decrease in competition in either the yellow pages consulting market or the advertising market would harm the advertisers who use both these services. Increase in competition in either market would, of course, benefit the advertisers.

On the other hand, increased competition in the consulting market would not be in plaintiffs' best interest because it would lead to the need for plaintiffs to charge lower rates to compete with each other. Likewise, increased competition in the advertising market would also harm plaintiffs. If increased competition took place in the advertising market, then lower rates would be charged by the publishers of the directories and there would be less of a need for plaintiffs' services.

Thus, if there are any antitrust theories that can be alleged, the advertisers would be the proper class of plaintiffs to claim antitrust injury. Moreover, plaintiffs' injury, if any, is indirect and derivative from that possibly suffered by the advertisers. Therefore, this second factor supports the finding that plaintiffs do not have antitrust standing.

C.

The third factor used in determining the standing issue is whether damages are too speculative. Two factors have been identified as indicating the speculative nature of a damage claim: (1) the indirectness of the injury, and (2) the possibility that the alleged injury may have been produced by independent factors. *Eagle*, 812 F.2d at 542. Plaintiffs' indirect injury has been addressed above.

The possibility of independent factors causing plaintiffs' injury were noted by plaintiffs' own damage expert, but were ignored for the purposes of calculating the damages. Callister Declaration, Exh. 12, at 81. These independent factors include: (1) how plaintiffs' marketing is conducted; (2) how many sales people it puts into the field; (3) the particular area in which those sales people work; (4) the portfolio of advertising that an advertiser currently contains in a book; (5) the degree of competition with other agencies; and (6) the economy of the region in question. *Id.*

Plaintiffs argue that their damages are not speculative. They cite letters showing that they lost customers because of GTE/DC's action. This might be true, but the resulting damage from those lost customers remains speculative. The only other evidence presented by plaintiffs is that one of plaintiffs' balance sheets reflected a significant drop in revenues in the time period after GTE/DC decided to deal directly with advertisers. The amount attributatble to GTE/DC's action is not addressed, and even plaintiffs' own damage expert admitted that other factors could have caused such a drop. Thus, plaintiffs' damage expert reveals that plaintiffs' damage claims are speculative. This factor, therefore, supports the finding that plaintiffs' do not have antitrust standing.

D.

The fourth factor used in determining antitrust standing is whether there is a risk of duplicative recovery. This is

a classic case in which the risk of duplicative recovery is great. As already discussed, the advertisers themselves have a possible claim for any alleged wrongdoing by GTE/DC. The advertisers harm, if any, is in the form of GTE/DC's overcharging and, therefore, they would collect the amount they were overcharged. Plaintiffs' harm, if any, is a percentage of the amount the advertisers were overcharged. If plaintiffs were to collect, plaintiffs and the advertisers would be asserting conflicting claims against the same monies. This is exactly what this factor was meant to protect against. *Eagle*, 812 F.2d at 542. Indeed, in their opposition papers, plaintiffs present no real argument against this factor. This factor further supports the Court's finding that plaintiffs do not have antitrust standing.

E.

The fifth factor used in determining antitrust standing is whether apportioning damages is too complex. This factor is extremely subjective given the long list of factors that plaintiffs' damage expert outlined. It is clear to the Court that any attempt to apportion damages would break down to a simple guessing game. Therefore, this factor as well supports the finding that plaintiffs do not have antitrust standing.

Reviewing all five factors, the Court finds that plaintiffs do not have antitrust standing in this case. They might have suffered some type of injury, but that injury is not redressed under the antitrust laws. Accordingly,

IT IS HEREBY ORDERED that:

1. GTE/DC's motion for summary judgment on the issue of antitrust standing is granted.

2. The Court declines to accept pendent jurisdiction on plaintiffs' remaining state claims.

APPENDIX C

Sherman Act § 1, 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act § 2, 15 U.S.C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act Section 4(a), 15 U.S.C. § 4(a)

(a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.